

BEFORE THE ARKANSAS COURT OF APPEALS

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**HEMPSTEAD COUNTY HUNTING CLUB, INC. AND
SCHULTZ FAMILY MANAGEMENT COMPANY**

VS.

CASE NO. _____

ARKANSAS PUBLIC SERVICE COMMISSION

INTERVENORS' NOTICE OF APPEAL

Hempstead County Hunting Club Inc., and Schultz Family Management Company (collectively, "Intervenors") respectfully file this Notice of Appeal to the Arkansas Court of Appeals pursuant to Arkansas Code Annotated § 23-2-423. Intervenors appeal the decision by the Arkansas Public Service Commission ("the Commission") as set out in Order No. 11 (the "Order") November 21, 2007 in Commission Docket 06-154-U, granting the Application of American Electric Power Company/Southwestern Electric Power Company ("SWEPCO" "Applicant," or "AEP/SWEPCO") for a Certificate of Environmental Compatibility and Public Need (the "Application" or "Certificate") to construct a major facility under the Utility Facility Environmental and Economic Protection Act (the "Act").¹ On December 20, 2007, Intervenors timely filed their Application for Rehearing preserving each ground set forth herein. On December 31, 2007, the Commission entered its Order No. 12 denying Intervenors' Application for Rehearing.

Intervenors respectfully submit the Order is not supported by substantial evidence, is arbitrary and capricious and is not in accordance with law. In entering the Order, the Commission did not regularly pursue its authority and thus violated the due process rights of the Intervenors. Intervenors respectfully request the Order be reversed.

I. Introduction

1. Applicant seeks to build, and the Commission has now granted a Certificate for, a 600 MW pulverized coal-fired power plant (the "Plant") near environmentally unique land owned by Intervenors. The Commission granted the Certificate notwithstanding the fact that SWEPCO's Application and Environmental Impact Statement ("EIS") were permeated with inaccuracies, inconsistencies, and inadequacies indicating that: the pulverized coal facility

¹ Ark. Code Ann. § 23-18-501, *et seq.* Throughout this Notice of Appeal, sections of the Act are sometimes cited as "Section ___."

chosen comes in last in every economic or environmental comparison with viable alternatives; the fuel source and pollution control technology selected are outdated and unjustified; the costs have never been completely or clearly calculated; the site selection process failed to meet even SWEPCO's meager criteria; SWEPCO failed to assess all components of the proposed plant, including a planned second unit, transmission lines and rail lines; and SWEPCO did not prove, in light of all of the circumstances, that the plant's environmental impact was "acceptable."

2. SWEPCO's application, testimony, and exhibits were insufficient for the Commission to make the findings required of it under Section 519 and issue the Order.

3. Additionally, the Commission set out certain "conditions" in granting the Certificate. However, these conditions are, at best, unenforceable and, at worst, vague and confusing. As set forth in Section X below, the Order gives no indication how or when these conditions are to be satisfied or how they will be enforced. This ambiguous Order cannot be considered final.² 1. The Commission's Order must be reversed because the Commission did not apply the correct legal standards for issuing a Certificate, ignored the unrefuted evidence introduced in opposition to the Application, and improperly assessed and credited SWEPCO's deficient evidence supporting its Application. The Commission's action was arbitrary, capricious and not in accordance with law or was otherwise an abuse of discretion. Further, in entering the Order, the Commission's final ruling must reflect that the Commission regularly pursued its authority, and did not violate any right of Intervenors under the laws or the

² The Commission's Order No. 13 of December 31, 2007 does nothing to cure these deficiencies. The Commission's Order No. 13 of December 31, 2007 does nothing to cure these deficiencies.

constitutions of the state of Arkansas or the United States.³ Since the Commission, in entering the Order, failed to meet this standard, the Order should be overturned.

II. Standard of Review

4. In order for the Commission to grant a certificate to an applicant, the applicant bears the burden of showing that it meets the requirements of Section 519 and establish its entitlement to a Certificate.⁴ 1. In granting SWEPCO's certificate, the Commission's decision must be supported by the weight of the evidence, by substantial evidence, free from fraud, and not arbitrary or capricious.⁵ 1. The Commission must regularly pursue its authority, and not violate any right of Intervenors under the laws or the constitutions of Arkansas or the United States.⁶ 1. The Commission's final ruling must indicate the evidence it relied on for each finding, even stating what conflicting evidence it considered.⁷ 1.

III. The Commission Failed to Assess the Application in Accordance with its Jurisdictional Mandate

³ Ark. Code Ann. § 23-2-423(c)(4); *Ark. Gas Consumers, Inc. v. Ark. Pub. Serv. Comm'n*, 354 Ark. 37, 49, 118 S.W.3d 109, 116 (2003). Ark. Code Ann. § 23-2-423(c)(4); *Ark. Gas Consumers, Inc. v. Ark. Pub. Serv. Comm'n*, 354 Ark. 37, 49, 118 S.W.3d 109, 116 (2003).

⁴ See SWEPCO's Motion to Permit Filing of Sur-Surrebuttal Testimony in Response to the Surrebuttal Testimony of Staff Witnesses David Schlissel and Jeffrey Loiter, July 31, 2007, Docket Item 144. References to "Docket Item ___" are to the official docket entry number for a particular filing in this case as found on the Commission's website. See SWEPCO's Motion to Permit Filing of Sur-Surrebuttal Testimony in Response to the Surrebuttal Testimony of Staff Witnesses David Schlissel and Jeffrey Loiter, July 31, 2007, Docket Item 144. References to "Docket Item ___" are to the official docket entry number for a particular filing in this case as found on the Commission's website.

⁵ *Harding Glass Co. v. Ark. Pub. Serv. Comm'n*, 229 Ark. 153, 162, 313 S.W.2d 812, 818 (1958); *City of Little Rock v. AT&T Commc'ns of the S.W., Inc.*, 318 Ark. 616, 622, 888 S.W.2d 290, 293 (1994). *Harding Glass Co. v. Ark. Pub. Serv. Comm'n*, 229 Ark. 153, 162, 313 S.W.2d 812, 818 (1958); *City of Little Rock v. AT&T Commc'ns of the S.W., Inc.*, 318 Ark. 616, 622, 888 S.W.2d 290, 293 (1994).

⁶ Ark. Code Ann. § 23-2-423(c)(4); *Ark. Gas Consumers*, 354 Ark. at 49, 118 S.W.3d at 116. Ark. Code Ann. § 23-2-423(c)(4); *Ark. Gas Consumers*, 354 Ark. at 49, 118 S.W.3d at 116.

⁷ *Ark. Pub. Serv. Comm'n v. Cont'l Tel. Co.*, 262 Ark. 821, 829-30, 561 S.W.2d 645, 649-50 91978); *Bryant v. Ark. Pub. Serv. Comm'n*, 45 Ark. App. 56, 63-64, 871 S.W.2d 414, 417-18 (1994); *Bryant v. Ark. Pub. Serv. Comm'n*, 62 Ark. App. 154, 159-61, 969 S.W.2d 203, 206-07 (1998). *Ark. Pub. Serv. Comm'n v. Cont'l Tel. Co.*, 262 Ark. 821, 829-30, 561 S.W.2d 645, 649-50 91978); *Bryant v. Ark. Pub. Serv. Comm'n*, 45 Ark. App. 56, 63-64, 871 S.W.2d 414, 417-18 (1994); *Bryant v. Ark. Pub. Serv. Comm'n*, 62 Ark. App. 154, 159-61, 969 S.W.2d 203, 206-07 (1998).

5. The Order relies primarily on SWEPCO's pre-filed direct testimony that did not survive cross-examination, as though it was undisputed rather than disproved, ignores SWEPCO's admissions on such critical issues as the facility's cost and the cost of addressing CO₂. The Commission's wholesale reliance on one-sided, unsupported, and later disproved, pre-filed conclusions undercuts the requirement and purpose of a public hearing. Reliance on these assertions was arbitrary and capricious, supported only by bare conclusions rather than substantial evidence, and was not in accordance with law.

6. As the Commission concluded:

the Commission has a duty to determine if a proposed major utility facility, as defined by the [Act], is environmentally "acceptable" even if it is determined that the facility meets or exceeds all existing environmental standards as required by the laws of the United States, the rules and regulations of the Environmental Protection Agency of the United States, the laws of the State of Arkansas, and the rules and regulations of the Arkansas Department of Environmental Quality (ADEQ)."

Order at 18 (emphasis added). Despite this acknowledgment of its statutory obligation to review the application independent of compliance with environmental regulation and regulatory permitting processes, the Commission repeatedly relies on the review and permitting processes of other agencies to determine the acceptability of environmental impacts. Order at 40, 42-43, 45, 48, 50-51, 55, and 57. The Commission's failure to independently assess the facility's environmental acceptability renders the Order arbitrary, capricious, and contrary to law. Furthermore, this reliance on other agencies represents the Commission's failure to regularly pursue its authority.

7. The Commission stated that, "No credible evidence has been provided that demonstrates with scientific validity or certainty that the plant will have a measurable impact on the recreational, natural, historic, or scenic values of these nearby areas." Order at 54. The Commission misunderstood and misapplied the statutory obligation of Section 511(8)(A),

which requires the *Applicant* to fully assess impacts to these areas. The Applicant is required to determine impacts, assess their effect, and mitigate adverse impacts. The Commission resorts to rewriting the Act and its mandate.⁸ Furthermore, the letters from the ADEQ,⁹ the Department of Arkansas Heritage,¹⁰ and the Arkansas Game and Fish Commission¹¹ established that these concerns continue to exist and have yet to be fully addressed, making the Commission's conclusion that these issues are resolved arbitrary and capricious, unsupported by substantial evidence and contrary to law.

IV. The Commission's Order Improperly Allowed Separation of the Analysis for the Turk Plant into Multiple Proceedings

8. Section 502(e) requires the Commission to consider *all aspects* of a proposed major facility *in a single proceeding*.

9. The term "major utility facility," Section 503(5), includes the electric generating plants, associated transportation and storage facilities, and electric transmission lines and

⁸ The Arkansas Supreme Court has made clear on many occasions, "The first rule of statutory construction is to construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language." *Jester v. State*, 367 Ark. 249, 239 S.W.3d 484, 490 (2006); *Littles v. Flemings*, 333 Ark. 476, 483, 970 S.W.2d 259, 263 (1998); *Lawhon Farm Servs. v. Brown*, 355 Ark. 272, 278, 984 S.W.2d 1, 4 (1998). The Commission ignores this axiom. The Arkansas Court of Appeals recently admonished the Commission to follow the law. This admonition makes the Commission's failure to follow the statute all the more stark and disturbing. *Consumers Utils. Rate Advocacy Div. v. Ark. Pub. Serv. Comm'n*, No. CA 06-379, 99 Ark. App. 228, 2007 WL 1698051, at *5 (Ark. Ct. App. 2007). The Arkansas Supreme Court has made clear on many occasions, "The first rule of statutory construction is to construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language." *Jester v. State*, 367 Ark. 249, 239 S.W.3d 484, 490 (2006); *Littles v. Flemings*, 333 Ark. 476, 483, 970 S.W.2d 259, 263 (1998); *Lawhon Farm Servs. v. Brown*, 355 Ark. 272, 278, 984 S.W.2d 1, 4 (1998). The Commission ignores this axiom. The Arkansas Court of Appeals recently admonished the Commission to follow the law. This admonition makes the Commission's failure to follow the statute all the more stark and disturbing. *Consumers Utils. Rate Advocacy Div. v. Ark. Pub. Serv. Comm'n*, No. CA 06-379, 99 Ark. App. 228, 2007 WL 1698051, at *5 (Ark. Ct. App. 2007).

⁹ ADEQ Response Letter to Commission, October 18, 2007, Docket Item 204. ADEQ Response Letter to Commission, October 18, 2007, Docket Item 204.

¹⁰ Dept. of Arkansas Heritage Response Letter to Commission, October 19, 2007, Docket Item 206. Dept. of Arkansas Heritage Response Letter to Commission, October 19, 2007, Docket Item 206.

¹¹ Arkansas Game & Fish Commission Letter to Commission, October 18, 2007, Docket Item 205. Arkansas Game & Fish Commission Letter to Commission, October 18, 2007, Docket Item 205.

associated facilities of a design voltage of one hundred (100) kV or more and extending a distance of more than 10 miles. SWEPCO is admittedly a major utility facility.

10. Despite the language of Section 502(e), the Commission found that SWEPCO had not sought a certificate of need for the “transmission lines *necessary to serve the proposed coal plant* [and that] SWEPCO will be required to seek certification of such transmission lines in a future Commission Docket.” Order at 26 (emphasis added). It further found:

When SWEPCO submits its application for a CECPN for the transmission lines to run out of the Turk plant, a transmission line EIS will be required. This will provide the public, any intervenors, staff and all various identified state agencies and the Commission to comment on the potential adverse environmental impacts associated with the siting of the transmission line.

Order at 30.

11. Additionally, the Commission relied on SWEPCO to take “appropriate action,” when it stated, “the transmission corridors *could* route around the easements so as to avoid any impact on the easements.” Order at 30 (emphasis added). This finding does not assess the impacts of any route the transmission lines may take and is an abdication of the Commission’s statutory duties, illustrating the need to resolve these issues in *one* proceeding.

12. The Commission must follow the laws that govern it as they are written. Regardless of the Commission’s reason for segmenting its proceedings in the past, Section 502(e) is clear the Commission must give all aspects of a project consideration in a single proceeding when determining whether to issue a certificate. Consideration of all aspects of the proposed Plant, including the transmission lines, railroad use, etc., is essential to a complete determination of the Plant’s environmental impacts.¹² The Commission’s election to ignore the

¹² While the Commission references *Ark. Power and Light Co. v. Ark. Pub. Serv. Comm’n*, 226 Ark. 225, 289 S.W. 2d. 668 (1956) for the proposition that agencies are given great deference and their statutory construction is favored, *see* Order at 73, the case actually stands for the fact that the agency is given deference as its findings are supported by substantial evidence, are not arbitrary and capricious, are free from fraud and not violative of the complainant’s

Act's plain language by trifurcating and segmenting dockets on need, the plant, and transmission lines is an unlawful procedure, arbitrary and capricious, and an abuse of the Commission's discretion. It is contrary to law and violates Intervenor's rights.

V. The Total Cost to Society of the Turk Plant is Too Large to Justify Its Construction

13. The Order is devoid of any analysis that takes "into account the total cost to society" of the Turk Plant required by Section 502(c), including costs such as: health, the loss of recreational activities (both in social and economic terms), CO₂ capture and sequestration, and extraction, transport, and use of pulverized coal in an ultra supercritical facility.

14. By failing to consider these costs to society, the findings in the Order are not supported by substantial evidence, and are arbitrary and capricious, and not in accordance with law.

15. Finally, the anticipated third-party plant owners have not signed the required Construction Ownership and Operation Agreement, and SWEPCO has no contingency plan if the minority partners do not participate.¹³ Therefore, no substantial evidence supports the conclusions that the Turk Plant can be constructed and operated in an economical manner rendering the Commission's Order arbitrary and capricious and contrary to law.

VI. The Commission Ignored the Fact that SWEPCO's Application Was Unsworn

16. The Order also failed to consider that SWEPCO's Application was unsworn.

rights. While the Commission references *Ark. Power and Light Co. v. Ark. Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W. 2d. 668 (1956) for the proposition that agencies are given great deference and their statutory construction is favored, *see* Order at 73, the case actually stands for the fact that the agency is given deference as its findings are supported by substantial evidence, are not arbitrary and capricious, are free from fraud and not violative of the complainant's rights.

¹³ McCellon-Allen Tr. 2798:10-2801:18; Hawkins Tr. 2034:2-7. References to "[witness] Tr. ___" are to the official transcript of witness testimony presented at the Hearing. McCellon-Allen Tr. 2798:10-2801:18; Hawkins Tr. 2034:2-7. References to "[witness] Tr. ___" are to the official transcript of witness testimony presented at the Hearing.

17. Section 511 is clear: “An applicant for a certificate shall file . . . a *verified* application. . .” (emphasis added). Despite this clear requirement, SWEPCO did not verify its Application nor, apparently, did the Commission require it.

18. To approve an application that fails this basic statutory requirement is arbitrary, capricious, and contrary to law.¹⁴

VII. The Commission did not Have Accurate Information to Assess the Plant’s True Estimated Cost

19. Without considering the evidence introduced at the hearing, the Commission adopted SWEPCO’s unsupported and contradicted conclusions regarding the Plant’s cost. SWEPCO repeatedly used an estimated cost of \$1.343 or \$1.344 billion for its calculations and analyses, though these numbers are contrary to the admissions of SWEPCO representatives Venita McCellon-Allen and James Kobyra at the public hearing. Under cross-examination, each admitted that the facility, with related transmission lines, would cost no less than \$1.754 billion without accounting for CO₂ costs.¹⁵

¹⁴ See *State of Ark. v. Jeske*, 365 Ark. 279, 288, 229 S.W.3d 23, 29 (2006), (when the initial pleading fails to comply with the prerequisites contained in the enabling legislation, the complaint and all orders issued in the action are void *ab initio*); *Brooks v. City of Benton*, 308 Ark. 571, 575-76, 826 S.W.2d 259, 261 (1992); *Rice v. Tanner*, 363 Ark. 79, 84, 210 S.W.3d 860, 865 (2005) (affirming trial court’s conclusion that complaint failing to meet statutory requirements was a nullity because it did not comply with Arkansas law); *Andrews v. Air Evac EMS, Inc.*, 86 Ark. App. 161, 170 S.W.3d 303 (2004) (affirming dismissal of complaint with prejudice where original complaint failed to meet statutory requirements for bringing a cause of action; complaint was a nullity and void *ab initio*, and the trial court lacked jurisdiction). See *State of Ark. v. Jeske*, 365 Ark. 279, 288, 229 S.W.3d 23, 29 (2006), (when the initial pleading fails to comply with the prerequisites contained in the enabling legislation, the complaint and all orders issued in the action are void *ab initio*); *Brooks v. City of Benton*, 308 Ark. 571, 575-76, 826 S.W.2d 259, 261 (1992); *Rice v. Tanner*, 363 Ark. 79, 84, 210 S.W.3d 860, 865 (2005) (affirming trial court’s conclusion that complaint failing to meet statutory requirements was a nullity because it did not comply with Arkansas law); *Andrews v. Air Evac EMS, Inc.*, 86 Ark. App. 161, 170 S.W.3d 303 (2004) (affirming dismissal of complaint with prejudice where original complaint failed to meet statutory requirements for bringing a cause of action; complaint was a nullity and void *ab initio*, and the trial court lacked jurisdiction).

¹⁵ McCellon-Allen Tr. 2978:5-2979:12; Kobyra Tr. 1190:23-1211:4. McCellon-Allen Tr. 2978:5-2979:12; Kobyra Tr. 1190:23-1211:4.

20. Additionally, SWEPCO's "estimate" of transmission costs is riddled with so many inconsistencies and qualifiers that the Commission could not possibly discern any reliable estimates.

21. The Commission's reliance on the bid-based analysis included in the ICF Study is likewise misguided because, as Renee Hawkins confirmed, it was based on a total cost of \$1.343 billion. That number proved to be low by no less than \$400 million and does not account for CO₂ costs.¹⁶ Under any definition, an understatement of estimated capital costs of over \$400 million is significant, and a potential \$1 billion cost overrun is staggering. This magnitude of uncertainty over the plant's cost should have been fatal to the Application, since the Application and evidence could not possibly comply with Section 502(c), or form the basis for any findings under Section 519.

22. In light of the record, the finding that Arkansas ratepayers will be served by the construction of the Turk Plant is arbitrary, capricious, not in accordance with law, and not supported by substantial evidence.

VIII. The Commission Incorrectly Relied on an Environmental Impact Statement that Did Not Comply with the Requirements of Section 511

23. Section 511(8)(A) requires that an applicant for a certificate file an EIS that: treat[s] in reasonable detail such considerations, if applicable, as the proposed facility's direct and indirect effect on the ecology of the land, air and water environment, established park and recreational areas, and on any sites of natural, historic, and scenic values and resources of the area in which the facility is to be located, and any other relevant environmental effects.

24. The Commission found:

With the filing of the testimony of Staff Witness Cotten, the Staff determined that SWEPCO's EIS was no longer deficient and that SWEPCO had satisfied the

¹⁶ SWEPCO's analysis greatly underestimated potential carbon capture costs. Schlissel Tr. 3722:24-3723:17. SWEPCO's analysis greatly underestimated potential carbon capture costs. Schlissel Tr. 3722:24-3723:17.

requirements of Ark. Code Ann. § 23-18-501 *et seq.*, including sections 511, 513, and 514.

Order at 37. Despite the fact that Mr. Cotten, acknowledged the EIS's deficiency as to Section 511(8)(B)(3)(i).¹⁷ An EIS at the federal, state, or local level is intended to aid well-informed agency decision making, with emphasis on providing input about environmental impacts for agency decision makers to consider.

25. An EIS calls for the project to be described, alternatives to be identified, and impacts to be evaluated. This pattern is virtually universal for an EIS under federal, state and local law, and in dozens of other countries.

26. SWEPCO's EIS has an extensive series of substantive errors, omissions, and internal contradictions that preclude it from reasonably serving its intended purpose of assisting public agency decision making.

27. SWEPCO's failure to file a suitably complete and accurate EIS with its initial application resulted in inadequate notice to the public during the time in which potential parties were required to decide whether or not to intervene in this proceeding, resulting in insufficient and ineffective public notice of the issues and impacts associated with the Turk Plant violating the due process rights of Intervenors.

28. The Commission's finding that the EIS is adequate is arbitrary, capricious, unsupported by substantial evidence, and contrary to law and a failure to regularly pursue its authority, as required by Arkansas Code Annotated Section 23-2-423(c)(4).

¹⁷ Mr. Cotten admitted the EIS failed to satisfy the important requirement of Section 511(8)(B)(iii) that the "...comparative merits and detriments of each alternate location" be analyzed as a part of the EIS. Cotten Dir. 21:20-22:4 Docket Item 102 and Cotten Tr. 3807:18-3808:19. The admission of this statutory failure also makes the Commission's conclusion that the facility conforms to applicable law, as required by Section 519(b)(9), unsupported by substantial evidence, arbitrary, and capricious. Mr. Cotten admitted the EIS failed to satisfy the important requirement of Section 511(8)(B)(iii) that the "...comparative merits and detriments of each alternate location" be analyzed as a part of the EIS. Cotten Dir. 21:20-22:4 Docket Item 102 and Cotten Tr. 3807:18-3808:19. The admission of this statutory failure also makes the Commission's conclusion that the facility conforms to applicable law, as required by Section 519(b)(9), unsupported by substantial evidence, arbitrary, and capricious.

29. The EIS failed to analyze off-site impacts, yet the Commission concluded, “[t]he impacts of physical activities on the plant property to area ecological resources, such as the Little River Bottoms, including Grassy Lake, will be insignificant if not immeasurable.” Order at 52. This finding is contrary to factual evidence presented by Intervenors and the admissions of SWEPCO witnesses. Because this finding is based on the EIS, the finding is arbitrary, capricious, and contrary to law.

30. The EIS fails to mention, much less consider, the “no-action” alternative.¹⁸ The EIS cannot be deemed adequate if it does not analyze the no-action alternative. The Commission’s conclusion that SWEPCO’s EIS is adequate without a no-action analysis is arbitrary and capricious, and unsupported by substantial evidence.

31. The EIS should have included a comparative cost and impact analysis between natural gas and coal, considering not only such factors as CO₂ costs, but also the factors of lower construction costs and emissions of a natural gas fired power plant.¹⁹

32. When the costs of carbon capture are included, Integrated Gasification Combined Cycle (“IGCC”) and gas plants are less expensive than pulverized coal.²⁰ However, these alternatives were either not considered or rejected without a substantiated basis.

33. The majority of cost comparison scenarios in both Exhibits SCW-S-3, and the analyses performed at the request of Staff, demonstrate pulverized coal is not the low cost alternative when all costs, including CO₂, are considered.²¹

34. Because the EIS is inadequate and fails to satisfy the requirements of the Act, the Commission should have enjoined the proposed action.²² The Commission’s failure to

¹⁸ See *Hammond v. Norton*, 370 F. Supp. 2d 226, 241 (D.D.C. 2005) (citing 40 C.F.R. § 1502.14).

¹⁹ *Mangi Dir.* 29:11-14.

²⁰ *Schlissel Tr.* 3698:22-24.

²¹ Exhibits SCW-S-3 (Exhibit 30 thereto); *Schlissel Tr.* 3591:16-22.

recognize the EIS's inadequacy is arbitrary, capricious, and contrary to law. Its finding of adequacy is not supported by substantial evidence and a failure to regularly pursue its authority, as required by Arkansas Code Annotated Section 23-2-423(c)(4).

1. The EIS fails to take a hard look at the information required.

35. Among other deficiencies, the EIS did not take the requisite "hard look," discuss, address, or analyze, and the Commission did not fully consider:

- (a) impacts associated with the relocation of the gas pipeline, mentioned in Section 1.2.9 of the EIS;
- (b) alternate locations for the water intake structure for the Turk Plant, identified in EIS Section 1.2.8, or compare the impacts associated with each;
- (c) impacts associated with an alternative (when an alternative is disclosed) or an analysis of those alternatives, in particular the EIS does not compare impacts associated with a gas plant to those of the Turk Plant;
- (d) useful information in the form of quality graphs and tables as required under NEPA, 40 C.F.R. § 1502.8;
- (e) impacts to the potentially valuable remnant of prairie habitat in an unknown location on the project site identified at page 2-65 of the EIS;
- (f) the geographic scope of the analysis of impacts to the natural environment, including areas and resources potentially affected by the project that are outside the project site;
- (g) cumulative impacts;
- (h) indirect impacts associated with the facility, including neurological and other health affects or costs from construction and operation of the facility;
- (i) the visibility of the power plant stack and its emissions plume, beyond a passing reference that there will be aesthetic impacts from the presence of a structure as tall as a 50-story building, and specifically does not address any impacts associated with the loss of visual amenities in a recreation area such as Millwood Park or the hunting clubs;
- (j) impacts to offsite waters of the United States including wetlands;

²² See *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 541 (1987).

- (k) impacts to endangered species and their habitat including the Ouachita Pocketbook Mussel;
- (l) impacts associated with other alternative technologies such as IGCC, natural gas combined cycle, or renewables;
- (m) impacts associated with the withdrawal and use of water from Millwood Reservoir;
- (n) impacts of the construction and operation of the facility on recreational uses and commercial and sport fishing in the region;
- (o) an alternatives analysis that includes alternative locations, technologies, and fuels;
- (p) a scoping process;
- (q) impacts associated with a second unit;
- (r) impacts associated with transmission lines (both gas and electric);
- (s) impacts associated with the construction, use, and operation of either the Union Pacific or Kiamichi Railroads;
- (t) impacts and costs associated with decommissioning the facility at the end of its useful life;
- (u) impacts associated with the mining, transportation, and use of Powder River Basin ("PRB") coal as compared with other coals or other fuels;
- (v) impacts and costs associated with the operation of an ultra-supercritical unit – rather than a supercritical unit as modeled. In this respect, there is no evidence to support selection of the ultra-supercritical unit, because neither cost nor impacts addressed an ultra-supercritical unit. Rather, SWEPCO's analysis provided information only on a supercritical unit that is less costly than, and generates different impacts from, an ultra-supercritical unit;
- (w) environmental impacts associated with other alternative locations;
- (x) differences in air emissions and impacts on Class I areas associated with other fuel, technology, or geographic alternatives (including natural gas and IGCC);
- (y) differences in impacts associated with using purchased electric power, merchant plants, existing SWEPCO facilities, or reducing wholesale contract obligations instead of constructing and operating the Turk Plant;

- (z) the failure to perform a “practicable alternatives analysis” as required by the Clean Water Act, and US EPA in its March 29, 2007 correspondence concerning SWEPCO’s Application for a Section 404 Permit;
- (aa) impacts associated with increased populations including construction and operational workforces;
- (bb) impacts associated with increased traffic as a result of the construction and operation of the Turk Plant;
- (cc) impacts associated with alternative locations for the water intake and discharge facilities;
- (dd) impacts associated with air emissions employing accurate climatological and wind data;
- (ee) impacts to Class I areas of alternative locations, fuels, and technology;
- (ff) impacts to offsite cultural resources that will be affected by construction and operation of the Turk Plant;
- (gg) reliance on stale and inaccurate data; and unsupported conclusions;
- (hh) that the EIS is internally inconsistent and contradictory in many ways. One example is its reference to annual coal use. At page 1-4 of the EIS, annual coal use is stated as 2.6 million tons per year. A few pages later at page 1-9, the EIS states that the maximum coal consumption at the Turk plant will be 3.2 million tons per year. The EIS does not reconcile these numbers, nor does it analyze the Turk Plant using the different alternatives of 2.6 million or 3.2 million tons per year. The EIS does not explain what volume of annual coal usage results in the impacts that are addressed in the EIS.
- (ii) impacts to human health;
- (jj) impacts of the release of radioactive elements from coal as it is consumed;
- (kk) impacts associated with the temperature of water discharge from the Turk Plant;
- (ll) noise impacts;
- (mm) economic impacts;
- (nn) socioeconomic impacts;
- (oo) distributive equity and environmental justice impacts;
- (pp) differences in impacts from wet and dry flue gas desulfurization units; and

(qq) Direct, indirect, and cumulative impacts of CO₂ emissions.

36. The Commission's failure to consider cumulative impacts is illustrated in its misplaced reliance on the hearsay statement that, "[t]he plant will emit approximately four to five million tons per year of CO₂; this represents approximately 0.2 percent of the total estimated emissions of carbon dioxide from electrical generation in the United States per year." Order at 46.²³ Based on its alleged low percentage of CO₂ contribution globally, the Commission waives off the CO₂ issue. In so doing, it relies on a statement that is not in the record. The Commission's reliance on information outside of the record is contrary to law, arbitrary and capricious, and unsupported by the record. Additionally, the nonexistent cumulative impacts analysis would demonstrate the significance of the Turk Plant's CO₂ emission in comparison with other sources.

37. The Commission's reliance on SWEPCO's conclusory statements, without proof, that SWEPCO's Plant is efficient and will reduce CO₂ emissions and that it will design the plant to implement future carbon-capture technology is an abdication of the Commission's responsibility to ensure that these impacts are addressed and evaluated. Order at 46-47.

38. The EIS is conclusory in its lack of factual support for its statements regarding environmental impacts. The Commission adopts many of these statements and relies on them in the Order. Such conclusory statements, without underlying evidence of impacts, render the Order arbitrary and capricious, and contrary to law.

39. By way of further example, the Commission abdicates its responsibilities to Arkansas citizens and ratepayers when it states:

Due to the ADEQ permitting requirements and SWEPCO's planned mitigation measures the Commission finds that the adverse environmental impact from the

²³ While Staff Witness Schlissel testified to the four to five million number, neither reference cited by the Commission state a percentage of total nationwide emissions.

construction and operation of the landfill to the air, water, and ecology is expected to be minimal and, therefore, acceptable.

Order at 51.²⁴ There is no factual evidence in the record to support this statement; no analysis of the impacts or any proposed mitigation. This determination is therefore arbitrary and capricious, not supported by substantial evidence, and not in accordance with law.

2. The EIS did not sufficiently explore or explain the effects of mercury deposition.

40. SWEPCO's modeling of mercury emitted from the stack did not evaluate additional mercury deposition associated with coal and ash handling, and did not evaluate deposition of mercury on any property other than Intervenors property. Even given these shortcomings in its modeling, SWEPCO still projected 750 million micrograms of mercury would be deposited on Intervenors' property over 25 years of plant operations. The Commission's conclusion that the projected mercury deposition is "acceptable" is unsupported by substantial evidence, is arbitrary and capricious, and not in accordance with law. Order at 41, 43, 44, 50, and 57. Additionally, the Commission again failed to pursue its authority by deferring to other agencies for oversight of the issue. Order at 43 and 57.

41. Neither the EIS nor the Commission analyzes:

- (a) whether the Little River/Grassy Lake area will be impacted by the deposition of mercury from the Turk Plant and what those impact are, if they do exist;
- (b) the release of radioactive elements from the coal as it is consumed, even though coal contains traces of the radioactive elements uranium and thorium at an average of approximately 1 ppm and 3 ppm per year, respectively;²⁵
- (c) the absence of a baseline mercury study, which would allow the potential for mercury toxicity at or around the Turk Plant to be properly considered, assessed and addressed;

²⁴ See ¶ 10, *supra*.

²⁵ Mangi Dir. 61:8-11.

- (d) that SWEPCO has not modeled the mercury deposition rate off site from the emissions from the Turk Plant; and
- (e) any mitigation for mercury impacts.

42. Neither the EIS nor the evidence at the hearing supported the Commission's conclusions and findings regarding mercury emissions and controls:

- (a) Any ADEQ-issued air permit for the plant will require mercury emission offsets. Order at 44.
- (b) The plant's mercury contributions are extremely small and essentially immeasurable as compared to the amount modeled to already deposit to the local area. Order at 44.
- (c) The necessary conclusion is that lowering mercury emissions from the plant, even to the point of eliminating the emissions, would have no identifiable impact on the area surrounding the plant site. The total mercury deposition to areas in the vicinity of the plant, including any contribution from the plant, is anticipated to decrease from current levels of deposition due to implementation of the Clean Air Interstate Rule (CAIR) and the Clean Air Mercury Rule. Order at 44.

Hence, the conclusions are unreasonable, arbitrary and capricious, and not supported by law or substantial evidence.

3. The EIS failed to explore or explain the effect of the emission of CO₂ from the Turk Plant or the costs of containing it.

43. In the Order, the Commission essentially fails to account for CO₂ because it does not know the ramifications of future regulation. Order at 62-64. The Commission should have rejected the testimony of SWEPCO's witnesses with respect to CO₂ costs and regulation as not reasonably based in fact. In failing to properly analyze CO₂, it once again turns its back on the law and Arkansas ratepayers and fails to regularly pursue its authority.

44. SWEPCO supplied no factual analysis of CO₂ costs associated with gas-fired plants, and therefore the Commission bases its Order on unsubstantiated conclusions, without an analysis of alternatives, in violation of its statutory obligations.

45. Even if the Commission finds that the actual *monetary costs* of CO₂ emissions regulations are too speculative to evaluate, the Commission is required to evaluate their *environmental impact*. This failure to pursue its statutory responsibility does not serve the public need, is unsupported by substantial evidence, arbitrary and capricious, and is contrary to the extensive record evidence on CO₂ costs.

4. The Commission failed to account for effects on federal Class 1 areas.

46. In the Order, the Commission essentially accepted, verbatim, the direct pre-filed testimony of SWEPCO's witnesses regarding the Plant's effect on federally-protected Class 1 areas under the Clean Air Act even though SWEPCO's analysis did not use an EPA-approved model.²⁶

47. In making this determination, the Commission again rejects its responsibility of independent analysis and fails to acknowledge undisputed evidence that proves SWEPCO's modeling was inaccurate, and/or demonstrated levels above those allowed by law.

48. The Federal Land Manager (the "FLM") has objected to the air permit for the Turk Plant, and the EPA has also objected based on, *inter alia*, the adverse impacts on Caney Creek.²⁷

49. Every round of Class 1 modeling has either employed the wrong model or has resulted in multiple readings in excess of permissible limits. The Commission's reliance on Flint Creek's putative success (disproved by the \$200 million SWEPCO is now required to spend on upgrades) and SWEPCO's faulty modeling with respect to Class 1 areas is arbitrary

²⁶ Supplemental Testimony and Exhibits of John Hendricks, August 21, 2007, Docket Item 66; US EPA letter, July 13, 2007, Exhibit to Trial Testimony.

²⁷ *Id.* See also Forest Service letters, Exhibits to Surrebuttal Testimony of James Mangi, October 18, 2006; and June 21, 2007, Docket Item 131.

and capricious, and contrary to law. Additionally, findings are not supported by substantial evidence.

5. The Commission failed to explore or explain the need for or use of a wet scrubber.

50. The EPA has advised the ADEQ that the Oklahoma and Texas permits have established wet scrubbers, with SO₂ emission limits 35% to 40% lower than the proposed Hempstead plant, as BACT for new coal-fired electric generating plants, and that the ADEQ must re-evaluate the BACT requirements for the Hempstead plant.²⁸

51. Because the Commission failed to assess the environmental impact of technology employed for pollution control and wholly ignored the EPA's concerns, the Commission's Order finding that either a wet or dry scrubber would be acceptable and meet BACT requirements is arbitrary and capricious, contrary to law, and fails to have any substantial evidence to support the Commission's conclusion. Further, the basis for the Commission's decision is reliance on review by another agency, a failure of the Commission to pursue its authority.²⁹

6. The Commission failed to explore adequately or explain the effects of the Plant on air pollution.

52. With respect to the issue of air pollution, the Commission's findings were based on speculative, conclusory testimony and are unsupported by substantial evidence.

53. The ADEQ noted in its October 18, 2007 response letter to the Commission that it was still in the process of reviewing information submitted by SWEPCO and was working to determine a path forward which might include "denying the permit."³⁰ Therefore, the

²⁸ Supplemental Testimony and Exhibits of John Hendricks, August 21, 2007, Docket Item 66; US EPA letter, July 13, 2007, Exhibit to Trial Testimony.

²⁹ See ¶ 10, *supra*.

³⁰ ADEQ Response Letter to Commission, October 18, 2007, Docket 204.

Commission's reliance on SWEPCO's conclusions, which contradict the reviewing agencies' statements, demonstrates that the Order, in this respect, is arbitrary and capricious, not supported by substantial evidence, and contrary to law.

54. The EIS and entire record are silent on the subject of radioactive ash. Therefore, the determination that these impacts are not substantial is without evidentiary support, arbitrary and capricious, and not in accordance with law.

7. The Commission failed to explore adequately or explain the effects of the Turk Plant on water resources.

55. The Commission found that the impacts on surrounding water bodies and wetlands as a result the Plant's operation would be "minimal," "insignificant," or "small." Order at 48 and 51.

56. The Commission concludes, despite a lack of supporting evidence, and evidence to the contrary, that there will be no off-site wetlands impacts. Order at 51. The lack of any evidence, study or modeling of any kind to substantiate this statement makes this finding arbitrary and capricious, and unsupported by substantial evidence.

57. The Commission states that water will be supplied through a contract with SAWD. Order at 47. Evidence in the record, however, shows that no contract is in place. Therefore, this conclusion is arbitrary, capricious, unsupported by substantial evidence, and contrary to law.

58. Furthermore, impacts of water usage were unsupported by factual analysis and not sufficient to substantiate the Order. The Commission's reliance on insubstantial or non-existent analysis is arbitrary, capricious, and contrary to law.

8. The Commission failed to explore adequately or explain the effects of noise from the Turk Plant.

59. Adding the Turk Plant raises the Day-Night Average Noise Level (“LDN”) at the site ST-7 from 39 to 53 dBA. A change of approximately 3-5 dBA is generally perceived by people as a doubling of the noise level. Site ST-7 would experience a change of 14 dBA, a substantial increase in the average noise at this site. Despite this fact, the Commission addressed noise from the Plant as follows:

Construction and operation of the plant will have a minimal, but unavoidable, impact on local noise levels. . . . SWEPCO has committed to work with area residents to determine if there are negative impacts from the noise and then implement mitigation steps to eliminate the impacts as possible.

Order at 56. The Commission’s failure to require SWEPCO to consider the noise impacts generated at the Plant, and require mitigation for them, only relying on the Applicant to determine impacts, is arbitrary and capricious, unsupported by substantial evidence, and contrary to law.

9. The Commission failed to explore adequately or explain the effects of the Turk Plant on traffic.

60. The Commission gives only fleeting regard to the Plant’s traffic impacts, stating:

land use impacts to the area include increased highway traffic during construction and operation of the plant, road relocation and construction activities if a rail spur to the Union Pacific Railroad is constructed, upgrades to the Fulton Publicly Owned Treatment Works (“POTW”), and increases in rail traffic to deliver coal for plant operation. None of these probable impacts are anticipated to be significant.

Order at 54.

61. The EIS’s data and information concerning transportation was incomplete. Section 2.5.2 states that traffic on Highway 355 would not increase sufficiently to produce congestion, but contains no data to support this conclusion or analysis of it.

62. The EIS contained no data on daily traffic volumes, level of service, or kind of traffic expected. There was no data or information concerning projected increases in traffic volume or the timing for such increases.

63. The EIS provided no baseline data with respect to the Union Pacific Rail line and its current or potential use. No analysis of impacts associated with either railroad was presented.

64. The Commission's reliance on incomplete analysis of transportation issues is arbitrary and capricious, not in accordance with law, and not supported by substantial evidence.

10. The Commission failed to explore adequately or explain the socioeconomic, economic justice, or cultural impacts of the Turk Plant.

65. The EIS's analysis and modeling of socioeconomic impacts (including payroll, indirect jobs, workforce, and growth) is inconsistent and contains a series of contradictions and errors, which prevented the information from being meaningful or useable. Still, the Commission relied on it almost exclusively.

66. For example, after declaring that much of the spending will be non-local, the EIS then presents a computer model for predicting job creation, which was run with the implied assumption that 100% of the spending would be local. Both assumptions cannot be correct.

67. The EIS's entire section on environmental justice inadequately states there are no environmental justice issues arising from the project. SWEPCO's failure to analyze distributive equity or environmental justice analysis makes the EIS inadequate.

68. The Commission adopts SWEPCO's findings as conclusive. Even though SWEPCO's testimony and exhibits contained inconsistencies and admissions. Further, the Commission simply failed to consider adequately environmental justice, actual resources or

socio-economic considerations. Such an analysis is arbitrary and capricious, not supported by substantial evidence, and contrary to law.

IX. In Accepting SWEPCO's EIS, the Commission Did Not Require a Sufficient Alternatives Analysis

69. The Commission misconstrues the burden of proof in this proceeding. In order to obtain the Certificate, the applicant, SWEPCO, "...shall file with the Arkansas Public Service Commission a verified application." Intervenors have no burden of proof before the Commission. The Order, however, at page 14-15, suggests that Intervenors have some burden to put forth a fully-modeled alternative to SWEPCO's "ultra-supercritical" facility. The Commission's misapplication of the burden of proof by shifting it to Intervenors is arbitrary and capricious, unjust, unreasonable and not in accordance with law.

1. Alternative Fuels

70. The Commission's finding that the selection of pulverized coal for the Turk Plant constitutes fuel diversity, Order at 16, is unsupported by substantial evidence and is therefore arbitrary, capricious, unjust, unreasonable and not in accordance with law.

71. The undisputed evidence at the hearing demonstrated that fuel diversity is not determined by capacity but by generation and³¹ SWEPCO generates approximately 88% of its power from solid fuel (coal and lignite).

72. It is also clear that, by October 2004, AEP had selected coal for its next baseload facility. Very early, the S&L study states, "In October 2004 [AEP] contracted [S&L] to evaluate potential sites for development of a coal-fired power plant."³² Prior to selecting coal,

³¹ Schlissel Tr. 3683:21-23.

³² Exhibit JAK-4 to James A. Kobyra testimony, filed pursuant to Order No. 9, Docket Item 152.

AEP never considered gas, renewables (including wind for some part of the project), existing merchant plant power, existing AEP/SWEPCO facilities, or nuclear power.

73. No evidence was presented at the hearing to support a conclusion that natural gas-fired plants are more costly than pulverized coal. To the contrary, gas-fired plants were never compared to a properly priced ultra-supercritical unit. To conclude, as the Commission did in the Order at footnote 15 and pages 25-26,, that a natural gas-fired plant is too expensive is not supported by substantial evidence and is arbitrary and capricious, unjust, unreasonable and not in accordance with law.

74. None of the air modeling, Section 404 permit process, or evidence adduced in this proceeding has been directed to or analyzed the use of coals other than PRB coal. The failure to analyze other coals makes the EIS inadequate, and its approval arbitrary, capricious, not supported by substantial evidence, and contrary to law.

75. Additionally, the Commission's reliance on Mr. Kobyra's conclusory statements regarding long-term supply uncertainty of alternative fuel sources does not provide substantial evidence upon which to base its order. Order at 24. Conclusions based on conclusions do not constitute evidence, and the final determinations based on them are arbitrary, capricious, unsupported by substantial evidence, and contrary to law.

2. Alternative Technologies

76. The Commission states:

Energy conversion processes, including ultra-supercritical and sub-critical steam generation, integrated gasification combined cycle (IGCC), natural gas combined cycle, or nuclear power could serve some of the necessary baseload functions and were evaluated as alternatives to the ultra-supercritical pulverized coal process proposed for the Hempstead plant.

Order at 25. There is no evidence in the record, regarding evaluation of these options, other than conclusory statements that SWEPCO did not choose them. This finding is arbitrary, capricious, not supported by substantial evidence, and contrary to law.

77. In fact, the ICF engineers could not model an ultra-supercritical unit, and the only ultra-supercritical unit designed by SWEPCO was downgraded to supercritical because of associated metal fatigue.³³ Yet, the Commission seemingly ignored SWEPCO witnesses who found the ultra-supercritical unit sufficiently complex that they could not give opinions about its performance.³⁴ The Commission's finding is baseless, arbitrary, capricious, and not supported by substantial evidence.

X. SWEPCO Failed to Adduce Evidence to Demonstrate the Findings Required Under Section 519 of the Act

78. "The commission may not grant a certificate for the location, financing, construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the commission, unless it shall find and determine" a host of factors that consider whether the proposed facility will, on balance, benefit the citizens and ratepayers of Arkansas, or whether the ultimate costs and impacts of the facility are too high.³⁵

79. The Order contains numerous provisions in which the Commission makes certain findings, despite the substantial law and evidence to the contrary, rendering those provisions of the Order arbitrary, capricious, unjust, unreasonable, not in accordance with law, and unsupported by substantial evidence. Further, the Commission's failure to follow the statute means that it failed to regularly pursue its authority.

³³ Kobyra Tr. 1537:6-15.

³⁴ Rose Tr. 1039:1-14.

³⁵ Section 519(b).

1. There Is No Need for the Facility, at Least not for Arkansas Rate Payers

80. In the Order, the Commission concludes that the need for the Turk Facility was determined in Docket No. 06-024-U, and since that ruling was not appealed, it is a final, dispositive ruling on the matter of need. Order at 13. The Intervenors were not parties to Docket No. 06-024-U. This makes the Commission's ruling particularly egregious because of the violation of the Intervenors' due process rights.

81. Section 519(a) requires the Commission to render its decision upon the record. The Order instead relies extensively on the testimony of Clark Cotten and Nicholas Atkins that was presumably offered and admitted in prior Docket Number 06-024-U. Testimony from a prior proceeding is not "on the record" for purposes of *this proceeding* and cannot form the basis for the findings required in Sections 519(b)(1) and (6). Reliance on testimony from a prior proceeding is unfair, prejudicial, arbitrary and capricious, unjust, unreasonable, and not in accordance with law because it does not allow Intervenors the right of cross examination and the ability to contest the premise of the decision in the prior proceeding.³⁶

³⁶ "In quasi-judicial administrative proceedings, there must have been a full and fair opportunity to contest the decision later argued to be *res judicata*. 46 AM. JUR. 2D *Judgments* § 580 (1994). *See also Campbell v. Arkansas Dep't of Correction*, 155 F.3d 950 (8th Cir. 1998). According to the Restatement (Second) of *Judgments* § 83(2) (1982), an adjudicative determination by an administrative tribunal is conclusive under the rules of *res judicata* only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

- (a) Adequate notice to persons who are to be bound by the adjudication, as stated in § 2;
- (b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;
- (c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;
- (d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and
- (e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions."

Brandon v. Ark. W. Gas Co., 76 Ark. App. 201, 214-15, 61 S.W.3d 193, 202-03 (Ark. Ct. App. 2001).

82. Section 519(b)(6) requires the Commission to determine “whether or not the facility financing method represents an acceptable economic impact *considering economic conditions and the need for and cost of additional public utility services.*” (Emphasis added). Undisputed evidence at the hearing demonstrated that SWEPCO had no need for the 600 megawatts sought to serve, in part, Arkansas ratepayers.

83. Evidence at the hearing indicated that if SWEPCO elects not to bid on the ETEC RFP, or fails in any bid it may make, SWEPCO would not need to construct the Turk plant. Additional evidence demonstrated excess plant capacity within the region is sufficient to meet generation need, and no more than 15% of the Turk Plant’s power generated will be allocated to the state of Arkansas. Evidence also demonstrated that without SWEPCO’s “voluntary” wholesale customer contracts, the 600 megawatt base load generating capacity is not needed. Profits from SWEPCO’s wholesale customer contracts are not shared with ratepayers. The evidence demonstrated that Hempstead County ratepayers and the public specifically, and Arkansas ratepayers as the public more generally, would be subjected to unnecessary economic and environmental risks associated with SWEPCO’s facility.

84. The Commission’s reliance on a determination of need in a prior proceeding – just as with addressing transmission lines in a subsequent proceeding – violates Sections 502(d) and (e) requiring all matters to be adjudicated in one proceeding and is arbitrary, capricious, unjust, unreasonable, and not in accordance with law. Because the record in this case actually shows that there is not a need for this plant, the Commission’s conclusions are not supported by substantial evidence that is on the record, is arbitrary, capricious, unsupported by substantial evidence, and not in accordance with law. By failing to follow the applicable

statutory provisions and procedures, the Commission has also failed to regularly pursue its authority as required by Arkansas Code Annotated Section 23-2-423(c).

85. The Commission may at any time rescind or amend by order any decision made by it.³⁷ Based on the evidence presented *in this proceeding*, the Commission should have rescinded its Order Number 3 in Docket No. 06-024-U, or at least reopened that proceeding to consolidate it with this one.

86. Separately, it is imperative to note that the Commission's assessment of SWEPCO's Application runs to the "need" for this facility under Section 519(b)(1). Even if it is appropriate or lawful for the Commission to rely on the finding of "need" for additional power from Docket 06-024-U - an order that at most indicates a need to obtain power in some form - it has not fulfilled its statutory responsibility to assess the "need" for *this particular facility* to supply that power, given the overall costs to society and the project's environmental impacts. This only demonstrates further why an application must contain a complete alternatives analysis to ensure that the Commission is able to assess properly the need for *this* facility, something impossible to do in this proceeding because of the absence of evidence.

2. The Turk Plant Does Not Represent an Acceptable Adverse Environmental Impact, Considering all the Circumstances

87. If SWEPCO does in fact *need* the pulverized coal baseload facility it proposes, it must demonstrate that any environmental impacts are acceptable. As noted by both Staff Witness Mr. Schlissel³⁸ and SWEPCO Witness Mr. Rose,³⁹ that demonstration requires more

³⁷ Ark. Code Ann. § 23-2-426.

³⁸ When asked by Commissioner Suskie what SWEPCO should do to achieve diversification of its portfolio, Mr. Schlissel responded that it should address energy efficiency, reduction of demand, renewables, IGCC, gas, and, finally, pulverized coal. Schlissel Tr. 3724:10-20. In the short term, he recommended gas while exploring wind energy. Schlissel Tr. 3725:1-3726:5.

³⁹ In testimony filed in another proceeding within three days of his testimony in this proceeding, Mr. Rose recommended that the Oklahoma Corporation Commission consider a wealth of other alternatives before permitting

than analyzing cherry-picked issues about the predetermined, preferred alternative, then declaring entitlement. Unfortunately, as shown above and incorporated herein by reference, these demonstrations were not made, and the Commission's order is therefore not supported by substantial evidence. Its entry is arbitrary, capricious, and not in accordance with law.

XI. The Commission's Conditions in Connection with Issuance of the Certificate are Vague, Imprecise, and Incapable of Enforcement

88. The Commission concludes the Certificate requested by SWEPCO should be issued subject to certain conditions. Order at 73. However, certain of those conditions are vague, imprecise, and unenforceable. Many of the conditions are too general in nature to be understood in a meaningful fashion. Other conditions include no guidance about the timing, information, or substance of SWEPCO's purported obligation.

89. The Commission's Order, like a judgment, should be "construed like any other instruments; the determinative factor is the intention of the court, as gathered from the judgment itself and the record."⁴⁰ In interpreting a judgment or order, courts look to "the language in which [the] order is couched," along with "whether the evidence supports [the] ruling."⁴¹ Where an order is sufficiently vague or ambiguous, it is unenforceable.⁴² The Order's conditions "are sufficiently vague or ambiguous" and thus should not be enforced.

a pulverized coal-fired facility. See *Intervenors' Hearing Ex. 2*; Rose Tr. 1085:5-17. In the Oklahoma proceeding, in addition to stating that there was "no analytic basis for an unbalanced capacity expansion plan that excludes combined cycle plants," Mr. Rose also testified that it is inappropriate to ignore the options of wholesale power or the purchase of existing plant power altogether. Mr. Rose acknowledged SWEPCO did not consider these alternatives for the Turk Plant. Rose Tr. 1085:13-21. He also outlined the numerous benefits of using alternatives other than pulverized coal. Rose Tr. 1088:13-1094:20.

⁴⁰ *Magness v. McEntire*, 305 Ark. 503, 506, 808 S.W.2d 783, 784 (1991).

⁴¹ *Id.* at 506, 784-85 (citing *Ark. State Bank Comm'r v. Bank of Marvell*, 304 Ark. 602, 607, 804 S.W.2d 692, 694 (1991)).

⁴² *Wallace v. Desha Co.*, 194 Ark. 848, 109 S.W.2d 950, 951 (1937) (in a proceeding for establishment of a road, county court's order was held to be void where it was so indefinite that the location of the roadway could not be found); *Burns v. Harrington*, 162 Ark. 162, 257 S.W. 729, 730 (1924) (same).

90. Condition No. 2 addresses docketing of matters relating to the Turk Plant's transmission line corridor and requires an "independent review and input" by SPP prior to SWEPCO instituting a transmission line proceeding before the Commission. Pursuant to Condition No. 2, prior independent review by the SPP is "in order to assure that the transmission lines not only move the power from Turk but improve congestion in the area." Order at 74. In the last sentence of Condition No. 2, the Commission states that the SPP "shall participate in subsequent transmission line docket matters related to the Turk Plant." Order at 74. The scope and nature of the SPP participation in future dockets, as well as the issue of whether SPP will participate, remain open and undefined. Condition No. 2 is too broad, vague, imprecise, and unenforceable to have meaning. Its inclusion in the Order is arbitrary and capricious, contrary to substantial evidence, and not in accordance with law.

91. Condition No. 3 conditions the Certificate on SWEPCO obtaining and complying with all required permits. This condition, however, lacks any temporal component or designation whether activities under the Certificate can move forward prior to the time the relevant permits are issued. Condition No. 3 is vague, imprecise, and unenforceable. Its inclusion in the Order is arbitrary and capricious, contrary to substantial evidence, and not in accordance with law.

92. Condition No. 4 directs SWEPCO "to cooperate with the Department of Arkansas Heritage pursuant to Section 106 of the National Historical Preservation Act of 1966." Order at 74. The "condition" is toothless in that the term "cooperate" is vague and imprecise, and no penalties are provided for SWEPCO's failure to "cooperate." Condition No. 4 is therefore unenforceable. Its inclusion in the Order is arbitrary and capricious, contrary to substantial evidence, and not in accordance with law.

93. Condition No. 6 requires that SWEPCO hire an independent monitor to provide the Commission and Staff with periodic “construction progress reports.” The Condition does not establish the information to be included in such reports, its use, or any penalties associated with either the independent monitor’s or SWEPCO’s failure. Even though it provides for an independent monitor, it fails to establish the bounds of the independent monitor’s authority. Condition No. 6 is vague, imprecise, and unenforceable. Its inclusion in the Order is arbitrary and capricious, contrary to substantial evidence, and not in accordance with law.

94. Condition No. 7 seeks to establish that Arkansas ratepayers will not be held financially responsible from “any adverse impact” related to Texas or Louisiana disproving the Turk Plant. The term “adverse impact” is vague and imprecise. The term “financially harmless” also lacks definition and meaning. Without defining these key terms, Condition No. 7 is too vague and imprecise to be enforced and its inclusion in the Order is arbitrary and capricious, contrary to substantial evidence, and not in accordance with law.

95. Condition No. 8 is also imprecise and unenforceable because the phrase “fully subscribed to by other utilities or wholesale customers” is not defined and is wholly ambiguous. Its inclusion in the Order is arbitrary and capricious, unsupported by substantial evidence, and not in accordance with the law.

96. Condition No. 9 seeks to establish the Commission’s right of first refusal to acquire any portion of the Turk Plant capacity not accepted by or which may in the future be released by any other jurisdiction or wholesale customer. This provision is, likewise, too vague, imprecise, and incomplete to be meaningful or enforceable. There are no terms associated with the right of first refusal; the phrase “acquire for the use and benefit of SWEPCO’s Arkansas customers” is undefined and vague. Additionally, that portion of the

Condition which grants the right of first refusal on “any portion of the Turk Plant capacity not accepted by or which may in the future be released by any other jurisdiction or wholesale customer” is vague and imprecise. Order at 75. In light of that, the inclusion of Condition No. 9 in the Order is arbitrary and capricious, not supported by substantial evidence, and contrary to law.

97. Condition No. 10 seeks to establish a procedure for prudent adjustments regarding any cost overruns associated with construction and operation of the Turk Plant. The Condition, however, is vague, imprecise, and incapable of enforcement. The “prudence review” would be dependent upon costs at the Turk Plant being “beyond the costs as estimated in this proceeding by SWEPCO or AEP.” Order at 75. Condition No. 10 is vague and imprecise. It is not supported by substantial evidence, arbitrary and capricious, and not in accordance with law.

98. Condition No. 11, as currently drafted, does not adequately address the mercury issue. SWEPCO has proposed a specific mercury study, which was introduced as MEH-7. The nearby property owners are most impacted by mercury emissions and not all are included in the process. Most importantly, the Commission should have retained jurisdiction to require SWEPCO continue to maintain state-of-the-art mercury controls and address any significant adverse environmental impacts resulting from mercury emissions from the coal plant. Accordingly, Condition No. 11, as it relates to mercury, should have been revised as follows:

The CECPN is further conditioned on SWEPCO conducting a base line mercury study and periodic update studies thereafter over the life of the plant in order to properly monitor mercury levels. The mercury study shall include, at a minimum, the elements provided in Exhibit MEH 7.⁴³ These mercury studies shall be planned, performed and evaluated in cooperation with the Staff, ADEQ, the Arkansas Game and Fish Commission, Intervenors, and all owners of property within a five (5) mile radius of the plant. In the event that the mercury study indicates that the mercury emissions from the plant have had a measurable

⁴³ Exhibit to Heitmeyer Dir, Docket Item 92.

adverse environmental impact, SWEPCO shall undertake all appropriate measures to mitigate that impact. SWEPCO shall annually perform an updated analysis of mercury controls, and at five year intervals shall retrofit the plant with the then applicable best available control technology for control of mercury emissions.

99. No time schedule is established for the putative base-line study. No time line is established for the putative periodic update studies. No enforcement action or penalty is established for either the failure to conduct the studies, or the revelation that mercury levels are unacceptably high. Condition No. 11 is not supported by substantial evidence; its inclusion in the Order is arbitrary and capricious and not in accordance with law, it is vague, imprecise, and incapable of enforcement.

100. Condition No. 11 additionally establishes that SWEPCO shall annually update its analysis of the technical and economic feasibility of CO₂ capture and sequestration. Pursuant to its terms, Condition No. 11 states, "if sequestration is determined to be technically and economically feasible by SWEPCO and this Commission, SWEPCO shall be prepared to install such technology." Order at 76. In the plain language of the Order, both SWEPCO and the Commission must determine CO₂ capture and sequestration is "technically and economically feasible." It is an abdication of this Commission's authority for SWEPCO to play any role in the determination of when a technology is technically and economically feasible. Condition No. 11 omits any criteria for the determination of when the technology is technically and economically feasible; it also does not require SWEPCO to install the technology – even if it is technically and economically feasible. Rather, SWEPCO must only "be prepared" to install such technology. Condition No. 11 is vague and imprecise, and as written, meaningless. It illegally empowers SWEPCO to make decisions reserved for the Commission. Its inclusion in the Order is arbitrary and capricious, not supported by substantial evidence, and not in accordance with law.

101. Condition No. 12 seeks to condition the Certificate on SWEPCO's compliance "with each of Staff's recommendations set forth herein above." Order at 76. This language, likewise, is too vague and imprecise to be meaningful or enforceable. The inclusion of Condition No. 12 in the Order is arbitrary and capricious, unsupported by substantial evidence, and contrary to law.

102. The existence of Conditions Nos. 1, 2, (each dealing with transmission lines), and 5 (addressing the Kiamichi Railroad) reflects the failure of the Commission to address all of the issues concerning the Turk Power Plant in one proceeding as required by Section 502(e) of the Act. By including transmission line and railroad issues as Conditions, the Commission defers its ruling on those portions of this major utility facility known. This deferral is illegal, arbitrary and capricious, contrary to law, unreasonable, and a violation of Intervenors' rights.

XII. SWEPCO Commenced Construction Without a Certificate

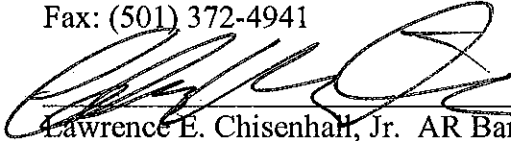
103. Section 510 is clear: "No person shall commence to construct a major utility facility in the state . . . without first having obtained a [Certificate]." Notwithstanding this clear statutory pronouncement, before the Commission could even begin the hearings to determine whether SWEPCO should be granted a Certificate, SWEPCO violated Section 510 by commencing construction at the Hempstead Site.

104. Undisputed video and photographic evidence at the hearing demonstrated that SWEPCO had commenced construction no later than June 6, 2007—more than five months prior to the Commission's Order. The Commission's failure to address this issue despite the Act's plain language, and SWEPCO's undisputed conduct, was arbitrary, capricious, unjust, unreasonable, not in accordance with law and unsupported by substantial evidence. Additionally, by failing to follow Section 503(2), the Commission has failed to regularly pursue its authority.

WHEREFORE, Intervenors respectfully submit that the issuance of the Certificate to AEP/SWEPCO was not supported by substantial evidence, was arbitrary and capricious, was not in accordance with law and did not constitute the regular pursuit of the Commission's authority and prays the Commissioner's Order No. 11 be in all things reversed, and overturned.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lawrence E. Chisenhall, Jr., hereby state that a copy of the foregoing pleading was served on the parties of record by U.S. Mail, postage paid, on this 29 day of January, 2008.

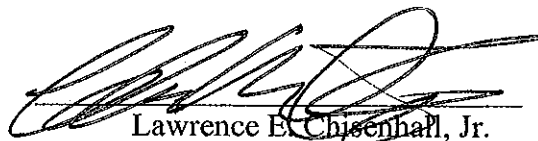
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